

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

Kusakabe v Minister for Immigration and Multicultural Affairs [2025]

FedCFamC2G 269

File number: MLG 4556 of 2019

Judgment of: **JUDGE SYMONS**

Date of judgment: 27 February 2025

Catchwords: **MIGRATION** – application for judicial review of Administrative Appeals Tribunal decision – affirmation of decision to refuse grant of Partner (Temporary) (Class UK) visa – whether the Tribunal misapplied or misconstrued the definition of “spouse” – whether the Tribunal conflated the two limbs of s 5F(2)(d) of the *Migration Act 1958* (Cth) – whether the Tribunal gave separate consideration to the question of whether the parties lived separately or apart on a permanent basis – whether the Tribunal afforded the applicant procedural fairness – whether the Tribunal complied with s 360 of the *Migration Act* – jurisdictional error established – writs issued – costs order made

Legislation: *Migration Act 1958* (Cth), ss 5F, 359A, 360
Migration Regulations 1994 (Cth), reg 1.15A

Cases cited: *EIC20 v Minister for Immigration* [2022] FCA 1000
LPDT v Minister for Immigration (2024) 98 ALJR 610; [2024] HCA 12
Minister for Immigration and Citizenship v SZKTI (2009) 238 CLR 489; [2009] HCA 30
Minister for Immigration and Citizenship v SZMOK (2009) 247 FCR 404; [2009] FCAFC 83
Nathanson v Minister for Home Affairs (2022) 276 CLR 80; [2022] HCA 26
SZOXF v Minister for Immigration (2015) 231 FCR 1; [2015] FCAFC 69

Division: Division 2 General Federal Law

Number of paragraphs: 68

Date of last submissions: 8 October 2024

Date of hearing:	8 October 2024
Place:	Melbourne
Counsel for the applicant:	Dr A McBeth
Solicitor for the applicant:	Clothier Anderson Immigration Lawyers
Counsel for the first respondent:	Mr J Barrington
Solicitor for the first respondent:	Sparke Helmore Lawyers
Solicitor for the second respondent:	Submitting appearance, save as to costs

ORDERS

MLG 4556 of 2019

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **SRIKANTA SILVA KUSAKABE**
Applicant

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL**
AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: **JUDGE SYMONS**

DATE OF ORDER: **27 FEBRUARY 2025**

THE COURT ORDERS THAT:

1. The name of the first respondent be amended to “Minister for Immigration and Multicultural Affairs”.
2. A writ of certiorari issue to quash the decision made by the second respondent on 21 November 2019.
3. A writ of mandamus issue directed to the Administrative Review Tribunal requiring it to reconsider and determine the matter according to law.
4. The first respondent pay the applicant’s costs as agreed or in default of agreement, in accordance with the scale set out in Schedule 2, Part 2 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

Note: The form of the order is subject to the entry in the Court’s records.

Note: This copy of the Court’s Reasons for judgment may be subject to review to remedy minor typographical or grammatical errors (r 10.14(b) *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 10.13 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth).

Part XIVB of the *Family Law Act 1975* (Cth) makes it an offence, except in very limited circumstances, to publish an account of proceedings that identify persons, associated persons, or witnesses involved in family law proceedings.

IT IS NOTED that publication of this judgment by this Court under a pseudonym has been approved pursuant to subsection 114Q(2) of the *Family Law Act 1975* (Cth).

REASONS FOR JUDGMENT

JUDGE SYMONS:

INTRODUCTION

1 By an application filed on 20 December 2019, the applicant seeks judicial review of a decision of the second respondent (**Tribunal**) made on 21 November 2019. The Tribunal affirmed a decision of a delegate of the first respondent (**Minister**) to refuse to grant the applicant a Partner (Temporary) (Class UK) visa (**visa**). The Minister opposes the application and says that it is without merit. The Tribunal has entered a submitting appearance (save as to costs) and has not participated in the proceeding.

BACKGROUND

2 The applicant is a naturalised citizen of Japan, originally from Sri Lanka. On 1 December 2014, the applicant married his wife, who is the sponsor of his partner visa (**sponsor**). On 5 December 2014, the applicant applied for the visa (Court Book (**CB**) 1-96) based on his marriage to the sponsor.

3 On 8 December 2014, a delegate of the Minister wrote to the applicant to request that he provide further information concerning his visa application (CB 98-105).

4 On 17 March 2016, the delegate sent the applicant another request for additional information, seeking that the applicant provide evidence of his relationship with his spouse (CB 120-125). On 22 April 2016, the applicant's representative sent a bundle of documents to the delegate in response to this request, including evidence of financial transactions between the applicant and the sponsor, text messages between the applicant and the sponsor, character references for the applicant, Centrelink statements for the sponsor, and certificates of authenticity for the sponsor's jewellery (CB 126-146).

5 On 6 May 2016, a delegate of the Minister refused to grant the applicant the visa (CB 147-154).

6 On 12 May 2016, the applicant applied to the Tribunal for review of the delegate's decision (CB 155-190).

7 On 1 August 2017, the Tribunal, differently constituted, affirmed the decision not to grant the applicant the visa (CB 190-205). The applicant sought judicial review of this decision, and it

was set aside by this Court by consent on 11 September 2018 and remitted to the Tribunal for redetermination.

8 On 21 August 2019, the Tribunal invited the applicant to attend a hearing on 30 September 2019 (CB 214-216).

9 On 25 September 2019, the applicant's representative provided a bundle of documents to the Tribunal via email (CB 217-417).

10 On 26 September 2019, the applicant's representative provided further submissions to the Tribunal (CB 426-440).

11 On 30 September 2019, the applicant attended a hearing at the Tribunal. He was assisted by an interpreter in the Sinhala and English languages and accompanied by his representative. The Tribunal took evidence from five witnesses (CB 441-442).

12 On 3 October 2019, the Tribunal sent the applicant an invitation to comment under s 359A of the *Migration Act 1958* (Cth) (**Act**) (CB 445-447).

13 On 17 October 2019, the applicant's representative provided further submissions in response to the Tribunal's invitation to comment (CB 448-526).

14 On 21 November 2019, the Tribunal affirmed the decision not to grant the applicant the visa and published a statement of reasons (**R**) (CB 532-553).

JUDICIAL REVIEW APPLICATION

15 On 20 December 2019, the applicant sought judicial review of the Tribunal's decision. On 10 September 2024, the applicant filed an amended application, identifying two grounds of judicial review. On 10 September 2024 and 26 September 2024, the applicant and the Minister, respectively, filed written submissions.

16 The hearing of the application took place before me on 8 October 2024 on which occasion the applicant was represented by Dr McBeth of counsel and the Minister by Mr Barrington of counsel. The applicant read the affidavit of Ms Karyn Anderson affirmed 10 September 2024 which annexed a transcript of the hearing conducted by the Tribunal on 30 September 2019 (**T**).

Ground one

17 Ground one states:

1. The Administrative Appeals Tribunal (“Tribunal”) failed to constructively exercise jurisdiction in misapplying or misconstruing the definition of ‘spouse’ in accordance with s 5F of the *Migration Act 1958 (Cth)*.

Particulars

- a. The Tribunal conflated the two alternative limbs of s 5F(2)(d)(i) and (ii) by failing to consider whether the parties lived their lives separately and apart on a permanent basis, regardless of whether they resided in the same house.
- b. Further and alternatively, the Tribunal failed to consider whether, if the parties lived separately or apart, they did so on a permanent basis.

18 It involves the contention that the Tribunal misconstrued and therefore misapplied s 5F(2)(d) of the Act which is an element of the definition of “spouse”.

19 Section 5F provides:

- (1) For the purposes of this Act, a person is the **spouse** of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.
- (2) For the purposes of subsection (1), persons are in a **married relationship** if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and
 - (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs 2(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

20 The applicant noted in relation to the Tribunal’s decision that it had (at R [73]) accepted that the applicant and the sponsor were validly married and had found that the evidence before it indicated that the parties were in a genuine and continuing relationship (at R [77], [89]).

21 The Tribunal was not however satisfied that the parties had resided together as claimed at a granny flat in the rear of the applicant’s sister’s house in Hampton Park in 2016, and at another residence in Narre Warren from 2017 to the time of the Tribunal’s decision in November 2019 (R, [68], [94]).

- 22 The applicant submitted that the Tribunal had then reasoned that because the applicant and sponsor did not reside in the same house, that “*the parties do not live together and live separately and apart on a permanent basis*” (R [68], [94]).
- 23 The applicant submitted that this reasoning involved a conflation of the two separate and alternative limbs in s 5F(2)(d) of the Act. This was because while a conclusion that the parties did not live together would result in limb (i) of s 5F(2)(d) not being satisfied, it did not address the different consideration in limb (ii).
- 24 The applicant referred in his submissions to ***SZOXF v Minister for Immigration*** [2015] FCAFC 69 in which a Full Court of the Federal Court had considered the similarly worded definition of “de-facto relationship” in s 5CB(2)(c) of the Act.
- 25 The Full Court found that the phrase “live separately and apart” where it appeared in that provision, encompassed both a physical separation and a mental separation, in the sense that the parties intended to live separate lives. It was observed that it is possible to live separately and apart under the same roof. Conversely, it is possible to reside in separate residences and not be living separately and apart in the requisite sense.¹
- 26 The applicant submitted that the Tribunal had failed to consider the alternative limb in s 5F(2)(d)(ii) properly construed in the way explained in *SZOXF*, once the Tribunal had concluded that the applicant and sponsor did not live together.
- 27 The applicant submitted that the error was material. This was because there was evidence before the Tribunal that was capable of supporting a finding that the parties lived their lives in a genuine and continuing relationship (this being the s 5F(2)(c) requirement) even if they did not live in the same house. Indeed, that is what the Tribunal found. The applicant submitted that the evidence relating to the financial aspects of the relationship and the social aspects of the relationship (considerations that apply to s 5F(2) by reason of reg 1.15A of the *Migration Regulations 1994* (Cth) (**Regulations**)) indicated that the parties were in a genuine and continuing relationship, as the Tribunal acknowledged (R, [77], [89]). The Tribunal also acknowledged that there was evidence that the parties saw the relationship as long term and had provided companionship and support to each other (R, [93]).

¹*SZOXF* at [54]-[60].

28 The applicant submitted that had the Tribunal correctly applied the second limb of s 5F(2)(d) of the Act there was a realistic possibility of a different outcome (referring to *LPDT v Minister for Immigration* (2024) 98 ALJR 610, [14]-[16]).

29 The applicant made the further submission that if the Court was to find (contrary to its primary submission) that the Tribunal had properly concluded that the applicant and sponsor lived separately and apart, it failed to consider whether that was a situation that would subsist “on a permanent basis”. The applicant submitted that there was no evidence that the Tribunal had engaged in this evaluation. The closest the Tribunal got was in R [92] and [93] which involved a reinforcement of the error.

Minister’s submissions

30 The Minister’s submissions contained an acknowledgement that a significant focus of the Tribunal decision was on whether the applicant and sponsor physically lived in the same household. The Minister submitted however that this focus did not disclose error and reflected the importance of the issue to the review, including in its capacity to inform the question of whether the applicant and his sponsor lived separately and apart on a permanent basis. The Minister noted that in the presentation of his claims, the applicant never attempted to put an argument that he and the sponsor did anything other than live physically together.

31 The Minister identified aspects of the Tribunal decision which he submitted indicated that the Tribunal had not focussed solely on whether the applicant and sponsor lived physically apart. This was said to emerge from the Tribunal’s consideration of the matters in reg 1.15A(3) including:

- at R [78] where the Tribunal noted that there was no evidence that the applicant and sponsor have joint responsibility for the care and support of any children, including the applicant’s son;
- At R [82], where the Tribunal noted the different evidence given by the applicant and sponsor about where they first met (even though they said they only met three times before getting married);
- At R [83], where the Tribunal noted the inconsistent evidence given about their housework responsibilities; and
- At R [88], where the Tribunal doubted that they watched movies together as claimed, and thought there was limited evidence of joint social activities.

32 The Minister identified as a further “strong indication” that the Tribunal did not focus solely on the living arrangements of the applicant and the sponsor, the Tribunal’s finding at R [93] which (with the Minister’s emphasis) reads:

There is evidence that the parties see the relationship as long term, and had provided companionship and support to each other. However, I give the most weight to the evidence of the circumstances of the relationship that indicates the parties have not lived together. For this reason, I find the evidence of the nature of the person’s commitment to each other indicates the parties do not live together, and live separately and apart on a permanent basis.

33 The Minister described the effect of this paragraph (as well as R [84]) as involving the Tribunal grappling with matters that went beyond the physical living arrangements. The Tribunal had simply found that it gave most weight to physical living arrangements and concluded that the applicant and sponsor lived separately and apart on a permanent basis. According to the Minister, had the Tribunal focused solely on living arrangements, there was no need for it to weigh that evidence against any other evidence.

34 The Minister submitted that the Tribunal had not failed to evaluate the temporal aspect of s 5F(2)(d)(ii). This was because the Tribunal had considered the future circumstances of the applicant and sponsor, including their claim that if the visa was granted they would bring the applicant’s son to live with them as well, and that the applicant would sell his property in Japan and buy property in Australia. The Minister submitted that it was this evidence which the Tribunal said was outweighed by the fact that the pair had not lived together. The Minister described this as “intelligible reasoning” which was responsive to the statutory question.

Resolution of ground one

35 As noted earlier in the applicant’s submissions, the leading decision on the meaning of “do not live separately and apart on a permanent basis”, *SZOXF*, makes plain that the expression connotes both a physical and a mental element that directs attention to whether the husband and wife are “living their *lives* separate and apart from each other as separate households” (*SZOXF* at [59(1)]). At [56]-[57], the Full Court explained, by reference to the history of the use of the phrase in different statutory contexts:

56. ...the mental element was independent of whether the parties lived in the same house. The mental element involved the intention of the parties to live separate lives following the destruction of the marital relationship (*consortium vitae*).

57. ...although the physical element required some physical separation of the parties, the ultimate question was not whether the parties were physically living together in the same house. Even living in the same house could involve the parties being “separate and apart”. The focus on the physical element was upon whether their physical behaviour involved “living lives separate and apart from one another”. That could occur in the same house. Conversely, it might have been possible for a husband and wife who maintained separate residences to fail to meet the physical element if, as a whole, their lives were lived as a single household.

36 The Tribunal recorded findings that used the statutory language of s 5F(2)(d)(ii) of the Act in five places as follows:

68. I have considered the inconsistent evidence and the responses received pursuant to the s. 359A invitation. There was evidence in relation to the applicant and the sponsor residing together at the sister D’s house in Pakenham, at the granny flat at 48 H Ave H Park, and at PH’s house in NW. I find I am not satisfied that the applicant and sponsor resided together at the granny flat at the rear of 48 H Ave H Park at any time. I find I am not satisfied that the applicant and sponsor resided together at PH’s house in NW. The evidence indicates the parties do not live together and live separately apart on a permanent basis.

69. There is oral evidence from the applicant and the sponsor in relation to where they first met, where the sponsor resided when the applicant returned to Japan, the parties’ bank account and where the applicant’s salary is deposited, where the parties resided in 2015 and why the addresses on the bank statements were or were not changed, the applicant’s evidence of his knowledge of the sponsor’s siblings, the sponsor’s knowledge of the applicant’s travels to Japan, evidence of the sharing of household tasks, the type of movie the parties last watched together, and their social activities visiting friends which indicate the parties are not in a genuine and continuing relationship, and do not live together and live separately and apart on a permanent basis.

...

84. The most significant evidence in the nature of the household is that I find the evidence of the parties’ living arrangements indicates the applicant and sponsor are not living together as claimed and they live separately and apart on a permanent basis, and this outweighs the other circumstances of the relationship in r. 1.15A(3)(b).

...

93. There is evidence that the parties see the relationship as long term, and have provided companionship and support to each other. However, I give the most weight to the evidence of the circumstances of the relationship that indicates the parties have not lived together. For this reason, I find the evidence of the nature of the persons’ commitment to each other indicates the parties do not live together, and live separately and apart on a permanent basis.

94. I have considered the evidence of the circumstances of the relationship as set out in r. 1.15A(3). I am not satisfied that the parties resided with the applicant’s sister D after their marriage at the time of application, I am not

satisfied the parties resided together at the granny flat at the rear of 48 H Ave H Park in 2016 and I am not satisfied the parties reside at the NW house from 2017 to the time of decision. For the reasons set out above I am not satisfied that the parties live together, and they live separately and apart on a permanent basis. Therefore I am not satisfied that the applicant and sponsor were in a spousal relationship within the meaning of s. 5F(2)(d) at the time of application and I am not satisfied that the applicant and sponsor are in a spousal relationship within the meaning of s. 5F(2)(d) at the time of decision.

- 37 I acknowledge of course that the decision of the Tribunal involved more than the findings recorded in these paragraphs. The Tribunal identified and evaluated the evidence that was before it in some detail and identified matters which it considered fell for consideration under reg 1.15A(3) of the Regulations. I accept that some of these matters were capable of informing the question of whether the applicant and sponsor satisfied s 5F(2)(d)(ii) of the Act.
- 38 However, there is no evidence that these matters were separately or consciously applied to the second limb of s 5F(2)(d)(ii). In this respect, as the applicant emphasised, each reference to the language of s 5F(2)(d)(ii) occurred immediately after the finding that the applicant and sponsor were not living together.
- 39 Both parties identified R [93] as supporting their respective construction of the Tribunal's approach to s 5F(2)(d)(ii). I prefer the construction applied by the applicant. It is consistent with an approach that permeates each of the paragraphs extracted above. This approach places the finding that the applicant and sponsor are not living together front and centre of an analysis that if conducted lawfully, required the Tribunal to engage with the manner in which the applicant and sponsor conducted their lives and households. This involves a different quality of evaluation. I further find that the Tribunal failed to give separate consideration to the question of whether the state of living separately and apart would be permanent in nature. This conclusion flows inevitably from my finding that the Tribunal failed to give consideration to s 5F(2)(d)(ii) as a whole.
- 40 I further accept that the misapplication of s 5F(2)(d)(ii) by the Tribunal was material. As the Tribunal itself acknowledged at R [70], "[T]his is a complex matter with diverse and competing aspects of evidence". I consider that there is a realistic possibility that had the Tribunal engaged separately with the question posed by s 5F(2)(d)(ii) the decision might have been different.

Ground two

41 Ground two reads:

2. The Tribunal failed to afford the applicant procedural fairness, or failed to comply with s 360 of the Act, by making a finding that the tenancy document between the owner of the Narre Warren property and the applicant and sponsor as tenants was fraudulent, without putting that proposition to the applicant, the sponsor or the landlord.

Applicant's submissions

42 Ground two relates to a residential tenancy agreement for a property in Narre Warren which the applicant provided to the Tribunal to support the claim that he and the sponsor were living in the property at the time of the Tribunal hearing (CB 299-300). The applicant also provided to the Tribunal proof of registration of the tenancy agreement with the Residential Tenancies Bond Authority.

43 The landlord of the Narre Warren property, Philip Hale (described as PH in the Tribunal decision record), gave oral evidence by telephone to the Tribunal. He deposed that he had downloaded the tenancy agreement form, filled it in and submitted it to the Authority (T 71 lines 1 to 5).

44 Following the hearing, the Tribunal sent the applicant a letter pursuant to s 359A of the Act which identified 13 specific concerns the Tribunal had with the applicant's case. The applicant provided a response in writing to the s 359A letter and further documentary evidence responsive to the Tribunal's concerns. The only concern the Tribunal identified with the applicant's accommodation in Narre Warren was the following (CB 446):

- xi. you stated your current home in Narre Warren has three bedrooms, whereas the sponsor stated it has two bedrooms, and the owner of the house stated it has four bedrooms.
- xii. you stated you currently pay \$150 per week rent whereas the sponsor stated you currently pay \$200 per week rent.

45 The applicant submitted that the only matter put explicitly to the applicant during the Tribunal hearing was that the Tribunal questioned the amount paid in rent, suggesting that it was a modest amount in the circumstances (T33, line 9).

46 The Tribunal recorded a finding at R [67] that "*I find the tenancy document at NW including both the applicant and the sponsor as tenants appears to have been prepared to mislead the immigration authorities and the tribunal*",

- 47 The applicant submitted that before recording this finding, which he said should be characterised as a finding of fraud or document forgery, the Tribunal was obliged as an aspect of its obligation under s 360 of the Act to invite an applicant to a hearing which provides a meaningful opportunity to give evidence and present arguments relating to the issues arising in relation to the decision under review, to give the applicant the opportunity of answering the accusation about the quality of the document.
- 48 The applicant submitted that the Tribunal failed to do so in this case because the closest it got to disclosing its concerns about the evidence of Mr Hale was the suggestion that he had appeared to mix up the circumstances of the applicant and the sponsor (T 72, line 7). The testing of the rent arrangements went no further than described at [44]-[45] above.
- 49 The applicant noted that the Tribunal's concerns identified in the s 359A letter had been addressed in the correspondence sent on his behalf by his representative. It could be expected that had the genuineness of the tenancy agreement been raised, it too would have been addressed by the applicant. The Court could assume in any case that the applicant could or would have convinced the Tribunal to the contrary position if satisfied that there had been a denial of procedural fairness (referring to *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80, [33]).
- 50 The applicant submitted that the breach was material as there was at least a realistic possibility that the Tribunal could have found that the applicant and his sponsor lived together at the Narre Warren property at the times claimed if it had accepted that the tenancy agreement was genuine.
- 51 The applicant submitted that the circumstances of his case engaged the same reasoning deployed by Moshinsky J in *EIC20 v Minister for Immigration* [2022] FCA 1000 at [45]-[46] and invited the Court to take the same approach.

Minister's submissions

- 52 The Minister submitted that there was no procedural unfairness in the approach taken by the Tribunal to the tenancy agreement and referred the Court to *Minister for Immigration and Citizenship v SZMOK* (2009) 247 FCR 404 at [33] and the statement that "[T]here is no general rule that the Tribunal cannot make a finding that a document is not genuine without specifically referring to its concerns about the document".

53 The Minister submitted that the Tribunal had not, in terms, found that the tenancy agreement was a forgery or was fraudulent but instead had found that the document “*appears to have been prepared to mislead the immigration authorities and the tribunal*”. This was an important distinction because it suggested that the Tribunal’s concern was with the information put into the pro forma residential tenancy agreement, which it thought had been placed there to mislead the Tribunal.

54 According to the Minister, on this analysis, the Tribunal had discharged its obligation of procedural fairness because it had asked the applicant questions about all the factual information contained in the residential tenancy agreement so as to put this information in issue. Specifically, the applicant was asked by the Tribunal:

- How much rent he paid (T30, line 16);
- Who owned the house (T30, line 41);
- Why Phillip Hale was also a lessee (or “tenant number 3”) (T31, lines 4-6);
- Who lives in the house (T31, line 35);
- Why Phillip Hale’s son was also on the tenancy (T31, line 44);
- How many bedrooms there were in the house (T32, line 1);
- Whether there was a shared bathroom (T32, lines 14-15);
- How utility bills were paid (T33-34).

55 Further, as the applicant noted in his submissions, the Tribunal had finished this line of questioning by commenting: “*I find it really hard to believe that you and your wife pay \$150 for a half a [house]. \$150 a week. So how many bank accounts do you have?*” (T 33, lines 9-10)

56 The Minister submitted that in the circumstances of this questioning and opportunity to respond, the applicant could hardly have been caught by surprise by the Tribunal’s finding in relation to the written tenancy agreement.

57 The Minister made the further submission that the issue arising in relation to the review was not in any case “whether the written tenancy agreement for the Narre Warren property was fraudulent”. The issue was whether the applicant and the sponsor lived together at Narre Warren (not whether one item among several relied upon to establish that claim was

legitimate). The tenancy agreement was just evidence going to this extant issue (referring by analogy to *Minister for Immigration and Citizenship v SZKTI* (2009) 238 CLR 489, [51]).

Resolution of ground two

58 Ultimately, I am not persuaded that the Tribunal failed to comply with s 360 of the Act or any extraneous right of the applicant to procedural fairness.

59 As the authorities, including those relied upon by both parties confirm, whether there has been a breach of procedural fairness will depend upon the circumstances of the case.

60 In this case, the significance of the residential tenancy agreement to the disposition of the review was that it communicated, or purported to communicate, certain information about the living arrangements of the applicant and the sponsor as they concerned the Narre Warran property. Without wishing to put too fine a point on it, it does seem that the Tribunal's concern was not so much with the residential tenancy agreement per se, but with the fact that it was the repository for information about which the Tribunal held expressly communicated concerns.

61 In this respect, I accept the submission of the Minister that the framing of the "issue" by reference to the genuineness (or otherwise) of the residential tenancy agreement does not accurately convey the manner in which the Tribunal reasoned to its conclusion. The Tribunal's concern, which was reflected in the questioning that occurred at the hearing on 30 September 2019, as well as in the Tribunal's statement of reasons, was with the genuineness of each of the shared living arrangements the applicant relied upon in support of his visa application.

62 Having reviewed the entire transcript of the Tribunal hearing, as well as the s 359A letter sent to the applicant following the hearing, I am satisfied that through a combination of the questioning that occurred (particularly of the applicant) during the hearing, and the questions identified for comment in the s 359A invitation, the applicant should have been on notice that the Tribunal had serious misgivings about the veracity of each of his shared living arrangements, including that which concerned the Narre Warren property.

63 The Tribunal was plainly concerned about key features of the Narre Warran tenancy including the amount of rent paid by the applicant and sponsor and the identity of the tenants named in the residential tenancy agreement. In this respect, I do not accept the submission of the applicant that the only matter raised explicitly with him at hearing was the amount of rent

paid. The Tribunal also questioned the applicant about why Mr Hale's son was identified in the residential tenancy agreement as a tenant but was not living at the property (T33, lines 9-10).

64 The evidence adduced from Mr Hale during the Tribunal hearing was that he was responsible for the creation and lodgement of the residential tenancy agreement. In circumstances where the Tribunal raised serious concerns about his credibility and reliability and about his knowledge of the applicant and the sponsor, it should in any event have been obvious to the applicant that any document he created in connection with the Narre Warren living arrangements would be treated with suspicion. The applicant clearly understood that Mr Hale's character was in issue because he produced a statutory declaration that sought to explain his behaviour at the hearing (CB 530).

65 While I accept that the finding recorded by the Tribunal at R [67] is similar in nature (akin to a finding of fraud) to that the subject of the appeal in *EIC20*, I am unable to accept that a finding of error inevitably follows.

66 Here, with the benefit of a transcript of the hearing, I am comfortably able to form a view that the applicant was not denied a meaningful opportunity to respond to the issues that were of significance to the review.

ORDERS

67 In circumstances where I have found that ground one of the application is established, writs of certiorari and mandamus will be issued to quash the decision of the Tribunal and require the Administrative Review Tribunal to reconduct the review of the delegate's decision in accordance with the law.

68 There will also be an order that the Minister pay the applicant's costs to be agreed, or in default of agreement to be quantified and paid in accordance with the scale set out in Schedule 2, Part 2 of the *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Symons.

Associate:

Dated: 27 February 2025